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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

CHARLOTTE BLUMBERG

Petitioner

versus

HCA MANAGEMENT COMPANY, INC.
AND HOOD GENERAL HOSPITAL

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Laurance L. Priddy
PRIDDY & CHOVANEC
5601 Bridge Street, Suite 450
Fort Worth, Texas 76112
817/496-6597

ATTORNEYS FOR PETITIONER

15pp

QUESTIONS PRESENTED

1. Whether petitioner was required to demonstrate that she filed her claim under the Age Discrimination in Employment Act with the appropriate state agency as a prerequisite to claiming the 300 day filing period that applies in deferral states and whether she did do so?

2. Whether petitioner is entitled to rely on *Mennor v. Fort Hood National Bank*, 829 F.2d 553 (5th Cir.1987), even though she did not cite it in her first brief, since under *Mennor*, petitioner is entitled to a 300 day filing period and her points of error regarding tolling are moot?

3. Whether the jury acted unreasonably in making a finding of fact that entitled petitioner to a period of equitable tolling so that her claim was timely even under a 180 day filing period?

LIST OF PARTIES

All parties to the proceeding before the United States Court of Appeals for the Fifth Circuit appear in the present caption.

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OPINIONS BELOW

The Fifth Circuit's order denying petition for rehearing dated August 1, 1988 is attached as Appendix A. The Opinion and Judgment of the Fifth Circuit dated July 5, 1988 is attached as Appendix B. It has been published as *Blumberg v. HCA Management Company, Inc.*, 848 F.2d 642 (5th Cir. 1988) The Memorandum Opinions of the district court dated September 8, 1987 and December 8, 1987, and the district court's Judgment dated December 9, 1987, are attached as Appendix C.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the order overruling petition for rehearing from which review is sought on August 1, 1988. 28 U.S.C., sec. 1254(1) confers jurisdiction on this Court.

STATUTORY PROVISIONS

29 U.S.C. sec. 626(d)

> **(d) Filing of charge with Secretary; timeliness; conciliation, conference, and persuasion.** No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed–
> (1) within 180 days after the alleged unlawful practice occurred; or
> (2) in a case to which section 14(b) (29 U.S.C. sec. 633(b)) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. . . . . .

29 U.S.C. sec. 633(b)

> **(b) Limitation of Federal action upon commencement of State proceedings**
> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under

section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purpose of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Article 5221k, Vernon's Annotated Texas Statutes

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ARTICLE 3. COMMISSION ON HUMAN RIGHTS, CREATION: POWERS

Commission on human rights

Sec. 3.01. (a) There is created the Commission on Human Rights to consist of six members. The governor shall appoint the commissioners with the advice and consent of the senate and designate one of the commissioners as chairman of the commission.

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Sec. 3.02. The commission has the following powers:

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(6) to receive, investigate, seek to conciliate, and pass on complaints alleging violation of this Act, and file civil actions to effectuate the purposes of this Act;

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Sec. 5.01. It is an unlawful employment practice for an employer.

(1) to fail or refuse to hire or to discharge an individual or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, handicap, religion, sex, national origin, or age; . . . .

******

Acts 1983, 68th Leg. 1st C.S., p. 37, ch.7, secs. 1.01 to 10.01, 10.04, 10.05, eff. Sept. 23, 1983 . . .

42 U.S.C. sec. 2000e-5(e)

Time for filing charges. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed

> by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

STATEMENT OF THE CASE

Charlotte Blumberg filed her complaint in the United States District Court for the Northern District of Texas, Fort Worth Division, on June 5, 1985, alleging that she had been terminated from her employment with the defendants, HCA Management Company, Inc. and Hood General Hospital due to her age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. secs. 621-634.

Upon trial, petitioner testified that she was born on January 8, 1920 and was 66 years old at the time of trial. She first began working as a nurse in 1941 and had worked in various nursing jobs prior to going to work for Hood General Hospital in 1977. She worked for Hood General Hospital until her termination in August of 1983.

HCA Management Company, Inc., took over management of Hood General Hospital in 1982. Prior to HCA's management of the hospital, petitioner had generally favorable performance appraisals. In March of 1983, HCA's director of nursing began to make frequent and very hostile criticisms of petitioner, which culminated in her termination on August 3, 1983.

Charlotte Blumberg testified the hospital replaced her immediately with Trisha Hartzoge, a woman in her 30's. However, the hospital director of nursing testified she did not replace petitioner until April 2, 1984, and that petitioner's replacement was a woman in her fifties.

The director of nursing also testified she replaced petitioner for insubordination, and turned her in to the Texas Employment Commission as having been terminated for cause, so that the Commission imposed a waiting period before petitioner could draw her unemployment benefits.

Petitioner testified she suspected age was a factor in her termination at the time she was terminated in August, 1983, but did not feel she knew it was until April of 1984. By that time, the hospital had fired a number of other older employees and petitioner felt a clear pattern of age-related discharges had emerged.

The jury found that age was a determinative factor in petitioner's discharge, but that she did not know and should not have known it was until April, 1984. The jury further found that the respondents acted wilfully in discharging petitioner and found she was entitled to $54,284.00 in back pay. See Jury Verdict, Appendix E.

The parties stipulated that the hospital discharged petitioner on August 3, 1983, and that she filed her charge of discrimination with the EEOC on May 23, 1984 (a period of 294 days). The parties further stipulated that Texas was not a deferral state at the time of petitioner's termination.

The district court disregarded the jury's finding that petitioner did not know and should not have known that she was a victim of age discrimination until April, 1984, and held she was charged with this knowledge as a matter of

law. Since Petitioner's charge was not filed with the EEOC within the 180 day limit for a non-deferral state, and since the court held as a matter of law that she was not entitled to a period of equitable tolling, the court granted judgment for the defendants. See Appendix C.

On appeal to the Fifth Circuit, petitioner contended the jury acted reasonably in finding that she did not gain knowledge that she was a victim of age discrimination until April, 1984, so that she should have been accorded a period of equitable tolling until April. Under those circumstances, her claim would have been timely, since it was filed on May 23, 1984, well within the 180 day filing period for a non-deferral state.

Through the trial level, all parties and the court had assumed the 180 day time period for a non-deferral state would apply, since Texas was not a deferral state at the time of petitioner's termination. In their brief, the respondents cited *Mennor v. Fort Hood National Bank*, 829 F.2d 553 (5th Cir.1987), a case decided on October 16, 1987, after the trial of petitioner's case. In *Mennor*, the Fifth Circuit held for the first time, and without citation of supporting authority, that in a Title VII case, a claimant who was terminated while Texas was not a deferral state would still qualify for the 300 days filing period where Texas became a deferral state within that period.

Petitioner had not been aware of the Mennor case prior to the respondent's attempts to distinguish it in respondent's brief. Petitioner filed a reply brief contending that, under *Mennor*, since Texas became a deferral state on September 23, 1983, less than two months after petitioner's termination, she should be entitled to the 300 day filing period, in which case her filing would be timely (having been done in 294 days) regardless of whether she was entitled ot a period of equitable tolling.

The Fifth Circuit rejected petitioner's argument, holding she could not rely on *Mennor*, since she did not cite it in her initial brief. The Fifth Circuit also held petitioner could not rely on *Mennor* because she did not demonstrate that she ever filed her charge with the Texas state agency. Finally, the Fifth Circuit affirmed the district court's holding that the jury acted unreasonably in finding that petitioner did not discover she had been a victim of age discrimination until April, 1984, so that, as a matter of law, she was not entitled to a period of equitable tolling. See Appendix B.

Petitioner moved for rehearing, and the Fifth Circuit denied the motion by order dated August 1, 1988. See Appendix A. Petitioner brings this petition complaining of the actions of the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

Summary of reasons

The petitioner carried her burden of proving that the hospital concealed from her the fact that her termination was age-motivated until April, 1984. For this reason, the Fifth Circuit should have upheld the jury finding in her favor, held that she was entitled to a period of equitable tolling, and held that her claim was timely even under the 180 day filing period applicable to a non-deferral state.

The Fifth Circuit should also have held that petitioner was entitled to 300 days in which to file her claim under the holding in *Mennor v. Fort Hood National Bank*, 829 F.2d 553 (5th Cir.1987), which establishes the rule for the Fifth Circuit that a claimant in a deferral state is entitled to 300 days in which to file a claim, even though the state was not a deferral state at the time of the discrimination complained of. Since petitioner's claim was filed in 294 days, under *Mennor*, it was timely even without a period of equitable tolling.

In holding that petitioner cannot rely on *Mennor* because she did not prove she filed her ADEA claim with the Texas Human Rights Commission, the Fifth Circuit's opinion conflicts with this Court's opinion in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 60 L.Ed.2d 609, 99 S.Ct. 2066 (1979), which holds that claimants in ADEA cases do not have to file timely state claims as a prerequisite to their federal claims, and can file their state claims even after their federal claims are on appeal with this Court.

In holding that petitioner cannot rely on *Mennor* because she did not cite it or argue for the 300 day filing period it provides for in her initial brief, the Fifth Circuit has arbitrarily refused to follow its own precedent, in violation of the principle of stare decisis.

The Fifth Circuit's opinion conflicts with this Court's opinion in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 60 L.Ed.2d 609, 99 S.Ct. 2066 (1979)

In holding that petitioner cannot rely on *Mennor* because she did not prove she filed her ADEA claim with the Texas Human Rights Commission, the Fifth Circuit has confused the law pertaining to Title VII cases such as *Mennor* with the law pertaining to ADEA cases, and has published an opinion in direct conflict with this Court's opinion in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 60 L.Ed.2d 609, 99 S.Ct. 2066 (1979).

In *Oscar Mayer*, this Court held as follows with regard to ADEA cases (at 441 U.S. 759):

> By its terms, the, the section requires only that state proceedings be commenced 60 days before federal litigation is instituted; besides commencement no other obligation is placed

> upon the ADEA grievant. In particular, there is no requirement that, in order to commence state proceedings and thereby preserve federal rights, the grievant must file with the State within whatever time limits are specified by state law. Rather, use of the word "commenced" strongly implies the opposite–that state limitations periods are irrelevant–since, by way of analogy, under the Federal Rules of Civil Procedure even a time-barred action may be "commenced" by the filing of a complaint. . . .

In *Oscar Mayer*, the claimant still had not filed a claim with the state agency at the time the case was considered by this Court. This Court held as follows (at 441 U.S. 764):

> We therefore hold that respondent may yet comply with the requirements of sec. 14(b) by simply filing a signed complaint with the Iowa State Civil Rights Commission. That Commission must be given an opportunity to entertain respondent's grievance before his federal litigation can continue. Meanwhile, the federal suit should be held in abeyance....

In Title VII cases such as *Mennor*, in deferral states, claims must be filed with the proper state agencies, and cannot be filed with the EEOC until they have been considered by the state agency for at least sixty days. In those cases, the court must inquire as to when the state and federal claims were filed in order to make a proper determination regarding whether the federal charge was timely. *Mohasco Corporation v. Silver*, 447 U.S. 807, 65 L.Ed.2d 532, 100 S.Ct. 2486 (1980).

On the other hand, an inquiry as to when the state charge was filed is unnecessary in an ADEA case. In ADEA cases, as in Title VII cases, the law mandates that, before the claim can be considered by the EEOC, it must be filed with the appropriate state agency. Such filing can be and usually is simultaneous. Unlike in Title VII cases, once the state and federal claims have been filed in an ADEA case, both state and federal jurisdiction exist, and the claims may be handled simultaneously. *Oscar Mayer & Co. v. Evans, supra.*

A majority of the circuit courts have followed *Oscar Mayer* in holding that the timeliness of a plaintiff's filing of a state charge in an ADEA case is irrelevant in determining whether the claimant is entitled to the 300 day filing period applying in deferral states. *Anderson v. Illinois Tool Works, Inc.*, 753 F.2d 622 (7th Cir.1985); *Jones v. Airco Carbide Chemical Co.*, 691 F.2d 1200 (6th Cir.1982); *Aronson v. Crown Zellerbach*, 662 F.2d 584 (9th Cir.1981) cert. den. 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed.2d 431 (1983); *Ciccone v. Textron, Inc.*, 651 F.2d 1 (1st Cir.1981), cert. den. 452 U.S. 917, 101 S.Ct. 3052, 69 L.Ed.2d 420 (1981); *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir.1981); *Davis v. Calgon Corp.*, 627 F.2d 674 (3rd Cir.1980) cert. den. 449 U.S. 1101, 101 S.Ct. 897, 66 L.Ed.2d 827 (1981).

Other circuits have applied the same holding to Title VII cases. *Mennor, supra; Smith v. Oral Roberts Evangelistic Association, Inc.*, 731 F.2d 684 (10th Cir.1984); *Citicorp Person-to-Person Financial Corp. v. Brazell*, 658 F.2d 232 (4th Cir.1981); *Owens v. Ramsey Corp.*, 656 F.2d 340 (8th Cir.1981).

Since it is irrelevant whether or not petitioner's claim with the Texas Human Rights Commission was timely, and since, under *Oscar Mayer*, if she has not filed a claim, she could still file it even now, the Fifth Circuit erred in citing her failure to

prove that she filed a state claim as a reason that the court could not consider her claim that, under *Mennor*, she was entitled to a 300 day period in which to file her EEOC claim.

Moreover, petitioner submits that the record shows that she did file the state charge, despite the Fifth Circuit's doubt in this regard. Since the EEOC cannot consider a claim until the state agency has done so, and since the record does show that petitioner received a right to sue letter from the EEOC, petitioner's filing with the state agency can be inferred from the very fact that the EEOC took action.

Attached as Appendix D is a copy of the claim petitioner filed. The parties stipulated that this claim was filed 294 days after her discharge. The claim was part of the record considered by the Fifth Circuit, having been attached to the respondent's motion for summary judgment.

The claim shows on its face that in the blank provided for "State or Local Agency", the words "Texas Human Rights Commission" are typed in. The Texas Human Rights Commission is the agency empowered to deal with civil rights complaints under Texas law. Article 522lk, Vernon's Annotated Texas Statutes. There is little doubt that the record demonstrates that the petitioner filed her claim with the appropriate state agency.

The Fifth Circuit says the typing of the name of the state agency on the form does not prove it was filed with that agency. It is really unimportant whether or not the claim was filed with the state agency, since under *Oscar Mayer*, petitioner does not have to prove she filed the case with the state agency in order to preserve her federal claim. She simply must obtain action by the state agency before the federal claim can be considered. Attached as Appendix F is the prayer in petitioner's reply brief, in which she suggests

that, if there is any doubt as to whether she filed her claim with the state agency, the cause should be remanded for a determination in this regard.

Such a procedure is clearly contemplated by *Oscar Mayer*, since in that case, this Court remanded the cause so that the claimant could file the appropriate state charge. Petitioner assures this Court that the evidence upon remand will demonstrate that she did file her case with the Texas Human Rights Commission. Even if she did not do so, under *Oscar Mayer*, she would still have the right to file it.

The Fifth Circuit arbitrarily refused to follow its own precedent in *Mennor v. Fort Hood National Bank*, 829 F.2d 553 (5th Cir.1987), in violation of the principle of stare decisis

The other reason given by the Fifth Circuit why the petitioner could not rely on *Mennor* is that she did not cite it or argue for a 300 day filing period in her initial brief. *Mennor* was not decided until October of 1987 and was not published in a bound volume of the Federal Reporter until early in 1988. Plaintiff's initial brief was mailed for filing on March 3, 1988.

Petitioner suggests that it is unduly harsh to deprive her of the benefit of this important holding just because she did not cite it initially, especially where the prior case law had indicated she would be limited to a 180 day filing period. *Schultz v. Dempster Systems, Inc.*, 561 F.Supp 1230 (E.D., Tenn. 1983); *Kerver v. Exxon Production Company*, 40 FEP Cases (BNA) 1567, Note 1 (S.D. Texas 1986).

Petitioner's first ground for reversal cited in her principal brief was that the district court erred in overturning the jury's award of her back pay. Petitioner submits this point

should have been broad enough to support the Fifth Circuit's consideration of *Mennor* as authority requring reversal in her favor.

The cases cited by the Fifth Circuit in support of the proposition that it could not consider *Mennor* involved attempts by parties to raise entirely new points in reply briefs. *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1539, n. 14 (5th Cir.1984); *United States v. Bucchino*, 606 F.2d 590, 591 (5th Cir.1979). cert. den. 446 U.S. 952, 100 S.Ct. 2917, 65 L.Ed.2d 808 (1980).

Petitioner says these authorities should not be held to prevent her reliance on new case authority germane to points in her principal brief and brought to the attention of the Fifth Circuit in her reply brief, since *Mennor* is an authority holding differently from prior authority on the point in question, and decided only shortly before the due date of petitioner's principal brief. Under the previous authority, there was no basis in precedent for the petioner to argue that she would be entitled to 300 days to file her EEOC claim.

Mennor is further germane to petitioner's third point of error raised in her principal brief. In that point, petitioner urged that she should be entitled to a period of equitable tolling based on the favorable jury verdict she had obtained. (Appendix E) Application of the rule in *Mennor* would accord petitioner a period of 300 days to file her claim.

Since the parties had stipulated that petitioner did file her claim in 294 days, under *Mennor*, the question of whether she was entitled to quitable tolling would be moot, since her claim would be timely without a period of equitable tolling. Surely a court should consider new authority that renders a point before the court moot, at whatever stage prior to rendering of the opinion that the court's attention is drawn to the authority.

The Fifth Circuit's refusal to consider the *Mennor* case amounts to an arbitrary refusal to follow its own precedent and violates the principle of stare decisis. As this Court said in *Moragne v. States Marine Lines*, 398 U.S. 375, 26 L.Ed.2d 339, 90 S.Ct. 1772 (at 358 U.S. 403):

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors. . .

See also *United States v. Maine*, 420 U.S. 515, 43 L.Ed.2d 363, 95 S.Ct. 1155 (1975); *United States v. Mason*, 412 U.S. 391, 37 L.Ed.2d 93 S.Ct. 2202 (1973).

The unfairness of the Fifth Circuit's refusal to follow *Mennor* in petitioner's case is compounded by the fact that the opinion does not purport to overrule *Mennor*. Rather, the court simply arbitrarily declines to follow it in petitioner's case.

Petitioner's case as it has been published will undoubtedly cause a great deal of confusion as to whether the Fifth Circuit did mean to overrule *Mennor*, since the synopsis of the case indicates that the court's holding was that creation

of the Texas Human Rights Commission "within a few months after termination did not entitle nurse to 300-day filing period available in deferral state." This summary of the holding is clearly contrary to the *Mennor* holding.

Petitioner submits that, if the principle of stare decisis has any meaning at all, the Fifth Circuit should have followed its own precedent in *Mennor* and accorded her the 300 day filing period available in deferral states. It should make no difference that *Mennor* is a Title VII Case, instead of an ADEA case because, as noted by this Court in *Oscar Mayer*, the purpose of the two statutes is similar and their construction should therefore be consistent.

The Fifth Circuit arbitrarily disregarded a reasonable jury finding in order to deny petitioner a period of equitable tolling.

The district court submitted the issue of when petitioner knew or should have known that she had been a victim of age discrimination to the jury, which found she did not know and should not have known this fact until April, 1984, less than two months before she filed her claim on May 23, 1984. The district court disregarded this finding and held that petitioner was charged with the knowledge she had been discriminated against from the date of her discharge on August 3, 1983, so that her claim was not timely under the 180 day filing period available in a non-deferral state. The Fifth Circuit upheld the district court's finding.

Petitioner is mindful of this Court's opinion in *Baldwin County Welcome Center v. Brown*, 104 S.Ct. 1723, 466 U.S. 147, 80 L.Ed.2d 196 (1984), holding (at 104 S.Ct. 1726) that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." However, petitioner believes

in her case, the issue of when she should have known to file a claim was one for the jury, and the jury finding in her favor should not have been disregarded.

It has been settled by this Court that the filing limits of the ADEA are "not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 71 L.Ed.2d 234, 102 S.Ct. 1127 (1982).

In its past decisions, the Fifth Circuit has promulgated reasonable standards for the application of equitable tolling:

> The statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights. A corollary of this principle, often found in cases where wrongful concealment of facts is alleged, is that a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense.

Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir.1975).

In *Pruet Prod. Company v. Ayles*, 784 F.2d 1275 (5th Cir. 1986), the Fifth Circuit held as a matter of law that the plaintiff was not entitled to a period of equitable tolling. Generally, however, equitable tolling does present a jury question. *Oaxaca v. Roscoe*, 641 F.2d 386 (5th Cir.1981); *Ott v. Midland Ross Corporation*, 600 F.2d 24 (6th Cir. 1979).

The Fifth Circuit and other circuits have held claimants to be entitled to periods of equitable tolling for various reasons, especially where the evidence shows a pattern of active concealment of facts by the employer. *Chappell v. Emco Machine Works Co.*, 601 F.2d 1295, 1302-3 (5th Cir.1979). *Tucker v. United Parcel Service*, 657 F.2d 724, 725 (5th Cir. 1981) (Black seasonal employees told that they would not be recalled, then the employer recalled almost exclusively white workers); *Meyer v. Reigel Production Corporation*, 720 F.2d 303, 305 (3rd Cir.1983), cert. dmd., 465 U.S. 1091 (1984) (Employer misrepresented to employee that his dismissal resulted from reorganization while secretly hiring a younger replacement); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir.1981) (en banc) (Misrepresentation resulting in the running of the statute of limitations); *Naton v. Bank of California*, 649 F.2d 691 (9th Cir.1981).

The standard adopted by the Fifth Circuit to determine whether a fact question should be presented to the jury is whether "the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes reasonable men could not arrive at a contrary verdict." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc). The Fifth Circuit purports to apply this standard to petitioner's case in its holding that the jury acted unreasonably in finding she did not discover that she had been victimized by age discrimination until April, 1984.

Petitioner testified that she was 63 years old when terminated on August 3, 1983, that she had been a nurse for many years, that she was discharged, and that she was replaced by a woman in her thirties. However, the hospital contended at trial that petitioner was actually replaced by a woman in her fifties not hired until April 2, 1984, shortly before plaintiff filed her EEOC charge on May 23, 1984.

Plaintiff's termination was the first of a series of terminations of older employees. In connection with some of the later terminations, hospital administrative personnel were heard to remark they could not consider applications for employment of those over 40. Petitioner did not have those facts until shortly before she filed her claim. Although she talked to various lawyers prior to filing her claim, none of them encouraged her to file, or were willing to file for her.

The testimony in the record is in conflict as to when petitioner first consulted a lawyer. At one point, petitioner said it might have been as early as September, 1983, but at another, she said it was late in 1983 or early in 1984. Under the standard of review for setting aside jury findings, petitioner should have been entitled to have all conflicts in the evidence resolved in her favor. That would have meant she did not consult a lawyer until early in 1984.

The hospital director of nursing claimed to have terminated petitioner for cause, and made a point of testifying before the Texas Employment Commission that petitioner had been fired for cause so she could not draw her unemployment benefits.

The fact the hospital contended petitioner was not replaced until April of 1984, taken with the hospital's contention that she was terminated for cause and the pattern of age-related terminations which evolved after petitioner's termination effectively demonstrated to the jury the lengths the hospital had gone to in order to make it appear it did not have an age-related motive in terminating petitioner. In other words, the hospital engaged in the kind of deliberate and calculated concealment that would properly support a period of equitable tolling under *Reeb, supra; Chappell, supra;* and *Zipes, supra.*

The petitioner was not in possession of sufficient facts as early as August, 1983 to charge her as a matter of law with knowledge that age was a factor in her termination. Petitioner did testify that she suspected age-related motivation at the time of her termination in August, 1983. She submits it is not good policy to require a claimant to file an EEOC claim on mere suspicion, or just because a claimant could establish a bare bones prima facie case. If claims must be filed on such a tenuous basis, the EEOC will be flooded to a greater extent than it is already with claims which cannot be supported.

Under the facts of this case, the jury could reasonably infer that the hospital intentionally concealed from the petitioner the fact that it had terminated her due to her age. The Petitioner should therefore be accorded a period of equitable tolling until April, 1984, so that her claim was timely even under the 180 day filing period applicable to a non-deferral state. The Fifth Circuit's holding and the district court's holding should be reversed because they unconscionably reward the hospital for its own chicanery.

CONCLUSION

For all of these reasons, petitioner Charlotte Blumberg respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAURANCE L. PRIDDY
Texas Bar Number 16323000

PRIDDY & CHOVANEC
5601 Bridge Street, Suite 450
Fort Worth, Texas 76112
817-496-6597

ATTORNEYS FOR PETITIONER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-1007

CHARLOTTE BLUMBERG,
Plaintiff-Appellant,

versus

HCA MANAGEMENT COMPANY, INC.,
and HOOD GENERAL HOSPITAL,
Defendants-Appellees.

U.S. COURT OF APPEALS
FILED
AUG 1 1988
GILBERT F. GANUCHEAU
CLERK
(stamp)

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING
(AUGUST 1, 1988)

Before GEE, RUBIN and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the aboved entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

s/s (illegible)
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.
(stamp)

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-1007
Summary Calendar

D.C. Docket No. CA-4-85-308-E

CHARLOTTE BLUMBERG,
Plaintiff-Appellant,

versus

HCA MANAGEMENT COMPANY, INC. and
HOOD GENERAL HOSPITAL,
Defendants-Appellees.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
AUG 18 1988 (initial d)
NANCY HALL DOHERTY, CLERK
BY s/s R. J. Capio
Deputy
(stamp)

U.S. COURT OF APPEALS
F I L E D
JUL 5 1988
GILBERT F. GANUCHEAU
CLERK
(stamp)

Appeal from the United States District Court for the Northern District of Texas

Before GEE, RUBIN, and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

July 5, 1988

ISSUED AS MANDATE: **AUG 11 1988** *(stamp)*

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By s/s M. Tomerry
Deputy
New Orleans, Louisiana
AUG 11 1988

(stamp)

B-3

Charlotte BLUMBERG,
Plaintiff-Appellant,

v.

HCA MANAGEMENT COMPANY, INC.
and Hood General Hospital,
Defendants-Appellees.

No. 88-1007
Summary Calendar.

United States Court of Appeals,

Fifth Circuit

July 5, 1988.

Discharged nurse brought action against hospital and hospital management company under Age Discrimination in Employment Act. The United States District Court for the Northern District of Texas, at Fort Worth, Eldon B. Mahon, J., entered judgment for hospital and management company, notwithstanding jury verdict, on grounds that nurse had failed to file charge with Equal Employment Opportunity Commission within 180 days after termination, and nurse appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) nurse had sufficient awareness of age discrimination claim to commence running of 180-day period; (2) nurse's failure to retain attorney did not toll 180-day period; and (3) creation of Texas Commission on Human Rights within few months after termination did not entitle nurse to 300-day filing period available in deferral state.

Affirmed.

1. **Civil Rights Key 43**

Plaintiff has burden of demonstrating factual basis to toll 180-day period within which unlawful discrimination charge must be filed with Equal Employement Opportunity Commission pursuant to Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2-17, 7(d)(1), 29 U.S.C.A. §§ 621-634, 626(d)(1).

2. **Civil Rights Key 33**

Possible bases for tolling 180-day period within which age discrimination charge must be filed with Equal Employment Opportunity Commission include pendency of suit between same parties in wrong forum, plaintiff's unawareness of facts giving rise to claim because of defendant's intentional concealment of them and Equal Employment Opportunity Commission's misleading of plaintiff about nature of his or her rights. Age Discrimination in Employment Act of 1967, §§ 2-17, 7(d)(1), 29 U.S.C.A. §§ 621-634, 626(d)(1).

3. **Civil Rights Key 33**

Employer's subsequent acts of alleged discrimination against other employees do not toll 180-day period within which employee must file discrimination charge against employer with Equal Employment Opportunity Commission pursuant to Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2-17, 7(d)(1), 29 U.S.C.A. §§ 621-634, 626(d)(1).

4. **Civil Rights Key 33**

Time within which employee must file discrimination charge against employer with Equal Employment Opportunity Commission pursuant to Age Discrimination in Employ-

ment Act begins to run when facts that would support cause of action are or should be apparent to employee, even if employee does not yet know of all evidence supporting claim. Age Discrimination in Employment Act of 1967, §§ 2-17, 7(d)(1), 29 U.S.C.A. §§ 621-634, 626(d)(1).

5. Civil Rights Key 33

Employee's awareness that she is being replaced in position she believes she is able to handle by person outside of protected age group commences running of 180-day period within which employee must file age discrimination claim against employer with Equal Employment Opportunity Commission pursuant to Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2-17, 7(d)(1), 29 U.S.C.A. §§ 621-634, 626(d)(1).

6. Civil Rights Key 33

Sixty-three-year-old nurse's knowledge that she was member of protected age class, hospital's notification that she was being terminated for cause from job that she considered herself qualified to perform and her belief that she was being replaced by woman in her 30's provided nurse with sufficient awareness of age discrimination claim to commence running of 180-day period within which charge had to be filed with Equal Employment Opportunity Commission pursuant to Age Discrimination in Employment Act, even if hospital later contended that full-time replacement for nurse was not hired until sometime later, when woman in her 50's was first employed. Age Discrimination in Employment Act of 1967, §§ 2-17, 7(d)(1), 29 U.S.C.A. §§ 621-634, 626(d)(1).

7. **Civil Rights Key 33**

Failure of discharged nurse to retain attorney did not toll 180-day limitations period within which she was required to file age discrimination charge against employer with Equal Employment Opportunity Commission pursuant to Age Discrimination in Employment Act; nurse had consulted attorneys within limitations period and had been informed that charge would have to be filed with Commission. Age Discrimination in Employment Act of 1967, §§ 2-17, 7(d)(1), 29 U.S.C.A. §§ 621-634, 626(d)(1).

8. **Civil Rights Key 33**

Creation of Texas Commission on Human Rights within few months after hospital's allegedly discriminatory firing of 63-year-old nurse did not extend 180-day period within which nurse was required to file age discrimination charge with Equal Employment Opportunity Commission to 300-day period available in deferral states; nurse did not raise deferral state issue in trial court or initially on appeal, but instead raised such issue for first time in reply brief on appeal, and furthermore, nurse failed to show that Equal Employment Opportunity Commission was requested to transmit or did in fact transmit charge to state agency. Age Discrimination in Employment Act of 1967, §§ 2-17, 7(d)(1), 29 U.S.C.A. §§ 621-634, 626(d)(1); Civil Rights Act of 1964, §§ 701 et seq., 706(d), as amended, 42 U.S. C.A. §§ 2000e et seq., 2000e-5(e).

Appeal from the United States District Court for the Northern District of Texas.

Before: GEE, RUBIN, and SMITH, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Charlotte Blumberg charges that she was discharged from employment as a nurse at Hood General Hospital in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. Blumberg was born on January 8, 1920, and was 63 years old when the Hospital discharged her on August 3, 1983, after she had been working there as a nurse for six years. Blumberg was replaced by a woman in her thirties. The defendants sought summary judgment on the basis that Blumberg's complaint had not been filed within the 180 days following termination that the statute allowed. Blumberg had filed a charge with the Equal Employment Opportunity Commission on May 23, 1984, 294 days after her discharge. She contended, however, that the 180-day filing period had been equitably tolled. The court reserved ruling on this motion and a subsequent motion for a directed verdict, and it submitted the case on the merits to a jury. The jury returned a verdict in favor of Blumberg, awarding her $54,284 in back pay.

In response to a special interrogatory, the jury found that it became or should have become apparent to Blumberg in April 1984 that age was a determinative factor in her discharge. This was less than 180 days before she filed her charge with the EEOC. The trial court nevertheless entered judgment in favor of the defendants notwithstanding the jury verdict, holding that Blumberg had failed to file a charge with the EEOC within 180 days of her termination as required by § 626(d)(1) of the ADEA and that she had not shown that the statutory period should be equitably tolled because she had testified that she had believed that age was a factor in the way she was being treated on the job and she had thought she was a victim of discrimination not only at the time of her termination but even six weeks before, for in June 1983, after her superiors had counselled her

about her job performance, Blumberg, with her son's help, had composed a letter that she never mailed and she thought at that time she was being discriminated against because of her age.

Conceding that her EEOC charge was filed more than 180 days after her discharge, Blumberg contends that the statutory period was tolled, first because there was substantial evidence to support the jury finding that she first knew of the age discrimination in April 1984, and, in addition, because (1) the Hospital opposed her claim for employment benefits on the basis that she had been discharged for cause, thus concealing important evidence; (2) she had difficulty finding a lawyer to represent her and succeeded in finding a lawyer to represent her and succeeded in finding present counsel only after two others had declined her case; and (3) the Hospital later terminated other employees because of their age, providing a further basis for her claim.

[1, 2] The ADEA provides that no civil action may be commenced until 60 days after a charge alleging unlawful discrimination has been filed with the EEOC and requires that such a charge must be filed within 180 days after the alleged unlawful practice occurred.[1] Timely filing is not, however, jurisdictional, and the 180-day period may be equitably tolled,[2] but if the complaint is not timely filed, the plaintiff has the burden of demonstrating a factual basis to toll the period.[3] In *Chappell v. Emco Machine*

1. 29 U.S.C. § 626(d)(1) (1982).

2. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 587-95 (5th Cir.1981) (en banc).

3. *Taylor v. General Tel. Co.*, 759 F.2d 437, 442 (5th Cir.1985).

Works Co.[4] we discussed three possible bases for tolling: (1) the pendency of suit between the same parties in the wrong forum; (2) plaintiff's unawareness of the facts giving rise to the claim because of the defendant's intentional concealment of them; and (3) the EEOC's misleading of the plaintiff about the nature of her rights. *Chappell* does not hold that these three are the only bases for tolling, but even if other circumstances may toll the running of the period, the circumstances of this case do not.

[3-5] Although Blumberg contends that she was not aware of *all* of the evidence upon which she ultimately relied at trial until sometime after her discharge, it is not necessary for a claimant to know all of the evidence for her to file a claim or to begin the 180-day period, nor do subsequent acts of alleged discrimination against other employees toll the period.[5] The time begins when facts that would support a cause of action are or should be apparent.[6] As we noted in *Pruet Production Co. v. Ayles*,[7] a plaintiff who is aware that she is being replaced in a position she believes she is able to handle by a person outside the protected age group knows enough to support filing a claim.

[6, 7] Here, Blumberg knew that she was a member of the protected age class, she was aware that she had been terminated from a job she considered herself qualified to

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4 601 F.2d 1295, 1302-03 (5th Cir.1979).

5. *Woodburn v. LTV Aerospace Corp.*, 531 F.2d 750 (5th Cir. 1976).

6. *Reeb v. Economic Opportunity Atlanta*, 516 F.2d 924, 930 (5th Cir.1986).

7. 784 F.2d 1275, 1279 (5th Cir.1986).

perform, and she believed her replacement to be a woman in her thirties, Tricia Hartzoge. Even if the Hospital later contended that a full-time replacement for her was not hired until sometime later, when Barbara Fordom, a woman in her fifties, was first employed, such a contention in no way lulled Blumberg into delaying the filing of her charge.

Blumberg also contends that the Hospital is estopped from invoking her failure to file a timely discrimination charge because it concealed the reason for her termination. Unlike the plaintiffs in the cases upon which she relies,[8] however, Blumberg was advised at the time of her termination that she was being discharged for cause, and she was able to evaluate the propriety of the reasons for her dismissal immediately. Blumberg's suggestion that the Hospital somehow misled her by not expressly declaring that her discharge was due to her age is tantamount to asserting that an employer is equitably estopped whenever it does not disclose a violation of the statute. This would make the 180-day period virtually meaningless.

Blumberg's reliance on her own failure to retain a lawyer is misplaced. She consulted attorneys within the limitations period and was informed that a charge of discrimination would have to be filed with the EEOC. She was not therefore ignorant of her rights.[9]

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8. *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303 (3d Cir.1983), *cert. dismissed*, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984); *Tucker v. United Parcel Serv.*, 657 F.2d 724 (5th Cir. Unit B. Sept. 1981); *Reeb*, 516 F.2d 924.

9. *See Taylor v. General Tel. Co.*, 759 F.2d at 442; *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1200 n. 8 (5th Cir.1975); *see also Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1050 (9th Cir.), *cert. denied*, _____ U.S. _____, 108 S.Ct. 504, 98 L.Ed.2d 502 (1987).

The district court therefore did not err in entering judgment for the defendants despite the jury's verdict. Under the standard set forth in *Boeing Co. v. Shipman*,[10] Blumberg's testimony establishes that the facts and inferences point so strongly and overwhelmingly in favor of her knowledge of her claim at the time of her discharge that reasonable jurors could not arrive at a contrary verdict.

[8] In the district court the parties agreed that when Blumberg was fired on August 3, 1983, Texas had no state agency for civil rights complaints and was therefore not a deferral state. Within a few months thereafter, Texas established a state agency, the Texas Commission on Human Rights, and became a deferral state. Had Blumberg been fired just a short time later than she was, she would have had the benefit of the full 300 days allowed for deferral states in which to file her claim.

In her initial brief, Blumberg relies solely on equitable tolling of the 180-day period. In her reply brief, however, she suggests that the creation of the Texas Commission on Human Rights, which occurred only after she had been discharged, entitled her to the extended 300-day period discussed by this court in *Mennor v. Fort Hood National Bank*.[11]

In *Mennor*, this court found that the creation of the Texas Commission on Human Rights after an allegedly discriminatory act had occurred entitled the charging party to the 300-day period available in deferral states under Title VII of the 1964 Civil Rights Act, 42 U.S.C. Section 2000e-5(e). Although *Mennor* was a Title VII case, we assume for

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10. 411 F.2d 365, 374 (5th Cir.1969).

11. 829 F.2d 553 (5th Cir.1987).

present purposes that the same result should obtain in an ADEA claim. Blumberg, however, cannot assert entitlement to the 300-day period for a number of reasons. She did not raise the issue in the trial court or initially on appeal; instead, she raised it for the first time in her reply brief, and we have repeatedly held that we will not consider alleged errors raised only at that late time.[12]

The plaintiff in *Mennor* presented evidence at trial that he had, in fact, initiated proceedings with the state agency. As we noted,

> The EEOC did transmit Mennor's March 29 charge to the TCHR on March 30, 1984, and the parties and the district court have treated this transmittal as the institution of proceedings with the TCHR within the meaning of 42 U.S.C. § 2000e-5(e). Shortly after the March 30 institution of TCHR proceedings, the EEOC issued its notice stating that the TCHR had waived its jurisdiction and that the EEOC would process Mennor's charge. The waiver of jurisdiction terminated the TCHR proceedings, and the EEOC apparently treated Mennor's charge as thereafter automatically filed with the EEOC.[13]

Blumberg presented no similar evidence.

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12. *See, e.g., Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1539 n. 14 (5th Cir.1984); *United States v. Bucchino*, 606 F.2d 590, 591 (5th Cir.1979), *cert. denied*, 446 U.S. 952, 100 S.Ct. 2917, 64 L.Ed.2d 808 (1980).

13. 829 F.2d at 555 (footnotes omitted).

Instead, Blumberg contends that a copy of the charge filed with the EEOC indicates that a charge was to be filed with the TCHR as well since both agencies are mentioned in the EEOC charge. Nothing in that charge, however, indicates that the EEOC was requested to transmit or did in fact transmit the charge to the TCHR. On the contrary, in the section labelled "Charge Number(s) (Agency Use Only)," the block has been checked indicating that the filing was made with the EEOC and that charge number 061-84-2276 has been assigned. The block marked "State/Local Agency" was left blank and no state number was listed, presumably showing that no filing with such an agency was desired.

For these reasons, the judgment is AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4-85-308-E

CHARLOTTE BLUMBERG AND
LONA BELL

VS.

HCA MANAGEMENT COMPANY, INC.
AND HOOD GENERAL HOSPITAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
DEC 9 1987
NANCY DOHERTY, CLERK
BY s/s Delores Duron
Deputy
(stamp)

JUDGMENT

This case was tried before a jury from September 22 through September 26, 1986. The complaint alleged that both plaintiffs had been discharged from their employment with Defendant Hood General Hospital (the hospital) in violation of the Age Discrimination in Employment Act (ADEA). 42 U.S.C. §§ 621-634. On September 26, 1986

the jury returned a verdict in favor of both plaintiffs awarding Charlotte Blumberg $54,284.00 in back pay and awarding Lona Bell $14,747.00 in back pay and $43,264.00 in front pay.

On September 9, 1987 the Court found that Plaintiff Charlotte Blumberg did not meet her burden of demonstrating a factual basis for tolling the statutory period and overturned the jury's award of $54,284.00 in back pay to Blumberg. The Court also found that Plaintiff Lona Bell was constructively discharged from her employment with Defendants, that the jury's finding that age was a determinative factor in her discharge, and that the jury's award of $14,747.00 in back pay was consistent with the evidence presented at trial. However, the Court further found that reinstatement rather than front pay was the appropriate remedy and that her discharge was not a willful violation of the Age Discrimination Act (ADEA).

It is therefore ORDERED and ADJUDGED that Plaintiff, Lona Bell, recover of and from the Defendants, the sum of Fourteen Thousand Seven Hundred Forty-Seven Dollars ($14,747.00), as lost wages and benefits from the time of her termination to the time of trial and reasonable and necessary attorney's fees in the sum of $18,741.87, all of which shall bear interest from the date of judgment until paid at the rate of 6.93 percent.

It is also ORDERED that the Defendants offer to reinstate Lona Bell's employment in accordance with the Court's Memorandum Opinion filed on September 9, 1987.

It is further ORDERED that Plaintiff Charlotte Blumberg recover nothing from the Defendants.

Entered this 8th day of December, 1987.

s/s Eldon B. Mahon
ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4-85-308-E

CHARLOTTE BLUMBERG AND
LONA BELL

VS.

HCA MANAGEMENT COMPANY, INC.
AND HOOD GENERAL HOSPITAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
SEP 9 1987
NANCY DOHERTY, CLERK
By s/s Deloris Duron
Deputy
(stamp)

MEMORANDUM OPINION

This case was tried before a jury from September 22 through September 26, 1986. The complaint alleged that both plaintiffs had been discharged from their employment with Defendant Hood General Hospital (the hospital) in violation of the Age Discrimination in Employment Act (ADEA). 42 U.S.C. §§ 621-634. On September 26, 1986 the jury returned a verdict in favor of both plaintiffs awarding Charlotte Blumberg $54,284.00 in back pay and award-

ing Lona Bell $14,747.00 in back pay and $43,264.00 in front pay.

Prior to trial, Defendants had filed summary judgment motions. The Court denied Bell's motion on the basis that there were unresolved fact issues and the granting of summary judgment would be inappropriate. In regard to Blumberg's motion for summary judgment, the Court found that while Plaintiff failed to timely file a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC), the Court reserved its ruling on Defendants' motion for summary judgment until after a trial on the merits.

At the close of Plaintiffs' case, Defendants moved for a directed verdict as to Blumberg on the grounds of untimely filing and as to bell on the issue of constructive discharge. Defendants further moved for a directed verdict on Bell's front pay claims, noting that Bell was not seeking reinstatement and that her alleged damages were highly speculative. Defendants also moved for a directed verdict on the merits as to both defendants, specifically noting that Bell had failed to show a *prima facie* case on the requirement that she was qualified for the position. The Court carried Defendants' motions for directed verdict along.

At the Court's order, the parties simultaneously submitted post-trial briefs on the issue of damages and the aforementioned issues which were previously presented in the motion for summary judgment and motions for directed verdict on January 20, 1987. After careful consideration of the complete trial transcript, the parties post-trial briefs, the pleadings, and the applicable law, the Court comes to the following decision.

CHARLOTTE BLUMBERG

It is undisputed that on August 3, 1983 Blumberg was terminated from her employment with Hood General Hospital. Blumberg further admits that she did not file her charge alleging unlawful discrimination with the EEOC until May 23, 1984, 294 days later. Based on these undisputed facts, the Court found in its September 17, 1986 Order that Plaintiff failed to timely file a charge of alleged discrimination with EEOC within the 180 days of her termination as mandated in Section 626(d)(1) of the ADEA. However, the Court did not grant Defendants' motion for summary judgment based on the admitted untimely filing but rather carried the motion along in order that the Court might hear evidence on Blumberg's assertion that the 180-day limitations period should be equitably tolled. Additionally, the Court did not grant Defendants' motion for directed verdict on Blumberg's claim but again carried the motion along. However, the Court stated that it was impressed by Defendants' motion for instructed verdict against Blumberg on the issue of equitable tolling. (Tr. Vol. V, p. 260). On September 26, 1986, the Jury found in favor of Blumberg and awarded her $54,284.00 in back pay. In response to Question No. 2 of the Verdict, the jury found that in April 1984 it was apparent to Blumberg or it should have been apparent to her that age was a determinative factor in her discharge.

Once this Court determines and the parties have not disputed the fact that Blumberg untimely filed her charge with the EEOC, Plaintiff Blumberg has the burden of demonstrating a factual basis for equitably tolling the statutory period. *Taylor v. General Telephone Co. of the Southwest*, 759 F.2d 437, 442 (5th Cir. 1985). The Fifth Circuit has set forth three categories which allow for the equitable tolling of the statutory period. *Chappell v. Emco Machine Works Co.*, 601 F.2d 1295, 1302-03 (5th Cir. 1979). Thus,

Plaintiff must show one of the following in order to toll the statutory period: (1) a suit between the same parties pending in the wrong forum; (2) the Plaintiff was unaware of the facts giving rise to her claim due to the Defendant's concealment of the cause of action; or (3) the EEOC has misled the Plaintiff concerning the nature of her rights. Plaintiff Blumberg has never alleged that she filed suit in the wrong forum nor that the EEOC had misled her concerning the nature of her rights under Title VII. Thus, the only contention Blumberg may raise under the Fifth Circuit standard for tolling the statutory period requires a showing by Plaintiff that she was unaware of the facts giving rise to her claim due to Defendants' concealment of the cause of action.

Blumberg claims that her failure to timely file EEOC charge was due to two factors; first, her inability to find legal counsel until April 1984; and second, she was unaware of the allege pattern of discrimination against older persons until April 1984. The Court is unpersuaded by Plaintiff's argument that the statute of limitations should be tolled because of her inability to find legal counsel until April 1984. Blumberg testified that in September or October of 1983 Plaintiff contacted Art Brender who was not interested in taking her case. In November 1983 she spoke with Tom Bordman in Dallas concerning her case. Plaintiff further testified that Mr. Bordman advised her to file her case with the EEOC since "that would be the procedure that I [Blumberg] would need to go through." (Tr. Vol. III, Pg. 409). Blumberg did not follow Mr. Bordman's advice and contacted a third attorney, Massie Tillman, but never spoke with him because his secretary was "rather discouraging." (Tr. Vo. III, Pg. 409). Five months later, Plaintiff contacted Laurence Priddy, Plaintiff's trial counsel, and subsequently an EEOC charge was filed on May 23, 1984.

Blumberg cannot rely on her failure to retain an attorney to toll the limitations period. Mere ignorance of legal rights under the ADEA does not toll the 180-day period. *Quina v. Owens-Corning Fiberglass Corp.*, 575 F.2d 1115, 118 (5th Cir. 1978). Moreover, Plaintiff admitted that she had consulted with an attorney, Tom Borman, within the limitations period and was informed that the proper procedure in order to proceed with her claim required her to first file a charge with the EEOC which she did not. Additionally, Plaintiff has shown a lack of due diligence in pursuing her claim. After specifically being told by Mr. Bordman that she needed to file an EEOC charge in order to pursue her claims, she waited five more months before attempting to retain an attorney and pursue her age discrimination claim and thereby delayed the filing of EEOC charge for six months after being advised that it was necessary. Under the facts of this case where Plainitff admits that she suspected age discrimination prior to her discharge in August 1983 (Tr. Vol. III - Pgs. 405-406) yet only contacted two attorneys over a three month period, failed to follow the advice of an attorney on filing an EEOC charge and waited five more months from the time she learned it was necessary to file an EEOC charge to contact an attorney, the Court finds that it would be inappropriate to equitably toll the statute of limitations based on her inability to obtain counsel.

Blumberg's second reason for her failure to timely file an EEOC charge is based on her claim that she was unaware of the alleged pattern of discrimination against older persons until April 1984. Blumberg testified that prior to her discharge she heard that statements had been made by her superior, Mrs. Connie Ettefagh, concerning getting rid of that old nurse, meaning Blumberg. (Tr. Vol. III - Pg. 406); although she considered such statements to be rumors. (Tr. Vol. III - Pg. 402). Additionally, Blumberg testified at her deposition and again reiterated at trial that at the time

she and her son drafted a letter to the hospital on June 20, 1983, six weeks before she was discharged, she believed she was a victim of age discrimination but she had no proof.[1] (Tr. Vol. III - Pgs. 405-406). Despite these beliefs, six weeks prior to her discharge and at the time of discharge. Blumberg did not file her charge with the EEOC until 294 days later.

In *Pruet Production Co. v. Ayles*, 784 F.2d 1255 (5th Cir. 1986), the Fifth Circuit recently addressed the issue of equitable tolling. The Fifth Circuit reiterated the following test for equitable tolling:

> [T]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights. A corollary of this principle, often found in cases where wrongful concealment of facts is alleged, is that a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense.

Pruet, 784 F.2d at 1279. The Fifth Circuit further stated that "[b]ecause of the difficulty an employee typically faces in proving an employment discrimination claim, he need only make a minimal showing in establishing a *prima facie* case." *Pruet*, 784 F.2d at 1279. Additionally, the Fifth Circuit cited as authority the Seventh Circuit standard for the showing required at the charge-filing stage. *Vaught v.*

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1. The June 20, 1983 letter was never sent to the hospital and did not state that Blumberg believed she was a victim of age discrimination.

R.R. Donnelley & Sons Co., 745 F.2d 407, 411-12 (7th Cir. 1984). In *Vaught* the Seventh Circuit stated:

> The purpose of the charge "is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case" (citation omitted). As the Supreme Court noted recently, "a charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit. The function of a Title VII charge, rather, is to place the EEOC on notice that someone . . . believes that an employer had violated the title." (quoting *EEOC v. Shell Oil Co.* [466 U.S. 54], 104 S.Ct. 1621, 1630-31 [80 L.Ed.2d 41] (1984).

In the instant case, Blumberg knew that she was a member of the protected class and that she had been terminated, and she believed herself to be qualified to perform the job. Additionally, Blumberg admitted that she believed in her own mind that age was a factor in the way she was being treated on the job, and she admitted both at her deposition and reiterated at trial that she thought she was victim of age discrimination not only at the time of her termination but even as early as six weeks prior to her termination in August 1983. Such evidence and belief was sufficient to warrant the filing of a charge at the time of her termination. Moreover, these beliefs of Blumberg's coupled with an attorney's advice to file an EEOC complaint within the statutory period does not warrant the tolling of the statutory period for filing an EEOC claim. Accordingly, the Court OVERTURNS the jury award of $54,284.00 in back pay to Charlotte Blumberg.

LONA BELL

On September 26, 1986 the jury found that Bell was terminated or constructively discharged from her employment with Defendants and that age was a determinative factor in her discharge from her employment with Defendants. The jury further found that Bell was entitled to an award of $14,747.00 in back pay and $43,264.00 in front-pay. Plaintiff asserts that the jury's findings that Bell was constructively discharged from her employment with Defendants and that age was a determinative factor in her discharge as well as the jury's award of back and front pay is consistent with the evidence presented at trial. Defendants argue that Bell did not establish a *prima facie* case concerning the termination of her employment and assuming that she has established a *prima facie* case the awards of both back and front pay are excessive.

To establish a constructive discharge,

> The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the agrieved employee.

Yound v. Southwestern Savings & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975). In order to claim a constructive discharge an employee must show that, under the terms offered by the employer, "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Bourque*

v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980), *quoting, Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977).

The standard set forth by the United States Court of Appeals for the Fifth Circuit for reviewing a judgment notwithstanding the verdict in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc) is the following:

> . . . the [District] Court should consider all of the evidence–not just that evidence which supports the non-mover's case–but in the light and with all reasonable inferences most favorable to the party opposed in the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the

> court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

411 F.2d at 374-75.

In applying the standard for a judgment n.o.v. to the facts of this case, the Court finds that "reasonable men" could arrive at the jury's decision that Bell was constructively discharged and age was a determinative factor in her discharge.

Thus, the Court will now address the jury's awarding of back and front pay in the case. On September 26, 1986 the jury found in favor of Bell and awarded her $14,747.00 in back pay and $43,264.00 in front pay. Plaintiff asserts that the jury award of $14,747.00 in back pay is consistent with the stipulation of pay prior to trial. The pay stipulation of $10,378.00 was projected through May 28, 1987 which was approximately three and a half months prior to the trial of this case. Defendants argue that the maximum possible verdict for Bell on the issue of back pay is $12,063.70. The Court finds that the approximate $2,684.00 difference between the jury award and Defendants' calculation of back pay does not amount to an excessive award of back pay for Bell since the jury could properly consider Bell's earnings, wages, and fringe benefits when arriving at their answer.

Similarly, Plaintiff claims that the jury award of $43,264.00 in front pay to Bell is consistent with the testimony that Bell could have continued working at Hood General Hospital for seven more years and her pay difference was between $5,000.00 and $6,000.00 a year. Defendants first assert that Bell is not entitled to an award of front pay. However, Defendants further assert that if Bell is entitled to front pay the jury award is excessive. Defendants argue that Bell could

have continued working at Hood General Hospital for only six and one-half years. Thus, since Plaintiff's counsel argued that Bell was entitled to approximately $5,000.00 a year, it logically follows that the maximum award of back pay to Bell would be $32,500.00 (6.5 years x $5,000.00).

Defendant has objected both prior to trial and at trial on the issue of front pay going to the jury. Defendants also moved for a directed verdict as to the issue of front pay, noting that Bell's testimony was speculative, that front pay was not a jury issue, and that Bell was not seeking reinstatement. Although the Fifth Circuit has not specifically addressed the issue of whether a private ADEA claimant was entitled to front pay, the Court finds that there is limited authority for such an award. *See Smith v. Office of Personnel Management*, 778 F.2d 254, 263 n.2 (5th Cir. 1985). *See Bim v. Western Electric Co.*, 496 F.Supp. 818 (W.D. Okla. 1980) (court allowed recovery of front pay up until the time of retirement in lieu of reinstatement in private ADEA cases where plaintiffs were all scheduled to retire within the next year. *EEOC v. Kallir, Phillips, Ross, Incorporated*, 420 F.Supp. 919 (S.D. N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920, 98 S.Ct. 395, 54 L.Ed.2d 277 (1977) (court awarded one year's pay to plaintiff in private Title VII case who could not be reinstated due to hostility at place of former employment); *Hyland v. Renner Products Co.*, 13 Emp. Prac. Dec. ¶ 11,427 (S.D. Ohio 1976) (court awarded six months pay to plaintiff in private Title VII case); *see also Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). In *Smith*, the Fifth Circuit also cited *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980), which held that a plaintiff who did not seek reinstatement was barred from seeking front pay.

Most recently, in *Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985), the First Circuit adopted the following front pay rule under the ADEA.

> Future damages should not be awarded unless reinstatement is impracticable or impossible; the district court, then, has discretion to award front pay. Because future damages are often speculative, the district court, in exercising its discretion, should consider the circumstances of the case, including the availability of liquidated damages.

Wildman, 771 F.2d at 616. From the evidence presented at trial, the Court concludes that many of Bell's problems at her job involved her former supervisor, Mr. Tony Wahl. Since Mr. Wahl no longer is employed at Defendant Hospital, the Court finds that Bell should be offered reinstatement rather than front pay. Therefore, the Court OVERTURNS the $43,264.00 jury award of front pay to Bell and instead ORDERS Bell's reinstatement.

LIQUIDATED DAMAGES

The jury returned special verdicts that the defendants had acted willfully in regard to the termination of both Plaintiffs Blumberg and Bell. Since the Court has found that Blumberg's claim under the ADEA is barred by the 180-day limitations period for filing a charge with the EEOC, the Court will only address the issue of liquidated damages with respect to Bell. Plaintiff reasons that since the jury found that Defendants committed a willful violation of the Age Discrimination Act (ADEA), Plaintiff is entitled to receive an award of double damages pursuant to 29 U.S.C. § 626(b). Defendants claim that the Court does have discretion in awarding liquidated damages when a willful violation

under the ADEA has not been proven and the Court may properly refuse to award liquidated damages if there is no evidence to support the jury's finding that Defendants acted willfully in knowing or reckless disregard of the law.

In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) the United States Supreme Court addressed the issue of liquidated damages by comparing the provisions of the ADEA with the Fair Labor Standards Act (FSLA). The Supreme Court reasoned:

> . . . § 16(b) for the FSLA, which makes the award of liquidated damages mandatory, is significantly qualified in ADEA § 7(b) by a provisio that a prevailing party is entitled to double damages 'only in cases of willful violations.'

29 U.S.C. § 626(b). The Supreme Court's ruling in *Thurston* implies that once it is determined that defendant's violation of the ADEA was willful the plaintiff is entitled to a mandatory doubling of damages.

The Court of Appeals for the Fifth Circuit has long held, even if a willful violation has occurred, liquidated damages, do not have to be awarded. *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1095 (5th Cir. 1981) (affirming the trial court's reduction of liquidated damages by 50 percent) in an age discrimination case; *Elliot v. Group Medical and Surgical Service*, 714 F.2d 558, 559 n.2 (5th Cir. 2983) (expressly rejecting arguments to change approach on liquidated damages.)

Since *Thurston*, one Fifth Circuit panel has continued to follow *Hays*. *See Le Compte vs. Chrysler Credit Corp.*, 780

F.2d 1260, 1262, 63 (5th Cir. 1986), while another panel has questioned *Hays*, at least in the context of a finding of retaliation for filing a claim under the ADEA. *See Powell v. Rockwell International Corp.*, 788 F.2d 279, 287 (5th Cir. 1986). In *Powell* the Fifth Circuit reasoned that:

> [even if] the *Hays* rule could have been properly applied in the context of retaliatory discharge, this rule has no vitality after the *Thurston* decision. Prior to *Thurston*, it was possible to find a willful violation, and also find that the employer had acted in 'good faith.' (citation omitted). Because Congress did not intend to impose liquidated damage liability upon employers for good faith violations, the *Hays* rule permitted the court discretion in awarding liquidated damages. Under the *Thurston* rule, however, 'good faith' can no longer coexist with 'willfulness.' The result is that only 'knowing' or 'reckless' violations of the ADEA are subject to liquidated damages. Thus, a further examination of good faith becomes irrelevant because it has already been factored into the *Thurston* 'willfulness' definition.

Powell, 788 F.2d 279, 287 (5th Cir. 1986).

Under the *Thurston* and *Powell* standards for awarding liquidated damages, once a willful violation is found then the damage amount must be doubled. The district Court has no discretion but to double the amount of liquidated damages when the evidence before the Court supports a finding of willfulness. However, when the issue of willfulness is before the Court, as it is in this case, it is within the Court's discretion to review the jury's finding of willfulness before

making a final determination on the question of liquidated damages.

The Supreme Court in *Thurston* has made clear that liquidated damages are a punitive measure to be reserved only for the most egregious violations of the Act, where the employer either "knows" or "shows reckless disregard" for whether its conduct violates the ADEA. 469 U.S. at 125. In *Thurston*, the Supreme Court emphasized that a stringent standard for imposition of liquidated damages would be maintained because such damages are punitive in nature. *Id.* at 125. As the Court noted, the original bill provided for criminal penalties in cases of willful violations and substituted liquidated damages only to avoid the evidentiary problems arising out of potential employer invocation of the Fifth Amendmant. *Id.* Thus, the Court held that the standard for imposing liquidated damages under the ADEA should be equivalent to that used to determine criminal liability under § 16(a) of the Fair Labor Standards Act. *Id.* at 126.

The Court further rejected any standard, such as that previously employed in the Fifth Circuit, which would allow a finding of willfulness merely upon a showing that the employer knew the ADEA was "in the picture" and thus potentially applicable to its actions.[2] Such a standard would be inappropriate for awarding punitive damages and, more importantly to the Court, would frustrate the ADEA's two-tiered liability scheme by making liquidated damages available in almost every case:

> [T]he "in the picture" standard . . . should not govern a provision dealing with liquidated

2. *See, e.g., Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 171), *cert. denied*, 409 U.S. 908 (1972).

> damages. More importantly, the broad standard proposed by respondents would result in an award of double damages in almost every case . . . Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provisions of ADEA § 7(b) in a manner that frustrates this intent.

469 U.S. at 127-28 (footnotes omitted).

The Court finds that Defendants' actions with respect to Bell cannot be labelled willful in this case. The Supreme Court in *Thurston* set forth the following standard for determing if a violation is willful under the ADEA:

> In general, courts have found that an employer is subject to criminal penalties under the FLSA when he 'wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law.' Nabob Oil Co. v. United States, 190 F.2d 478, 479 (CA10), cert. denied, 342 U.S. 876, 96 L.Ed. 658, 72 S.Ct. 167 (1951); see also Darby v. United States, 132 F.2d 928 (CA 5 1943). This standard is substantially in accord with the interpretation of 'willful' adopted by the Court of Appeals in interpreting the liquidated damages provision of the ADEA. The court below stated that a violation of the act was 'willful' if 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' 713 F.2d,

> at 56. Given the legislative history of the liquidated damages provision, we think the 'reckless disregard' standard is reasonable.

Thurston, at 469 U.S. at 126. Under the *Thurston* standard it would have to be shown that Defendants knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.

For *Thurston's* two-tier liability scheme to have any meaning, a plaintiff seeking liquidated damages must show egregious circumstances, beyond that necessary to establish liability under the ADEA. Indeed, the U. S. Court of Appeals for the Third Circuit recently held that "in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some *additional evidence* of *outrageous conduct*." *Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 658 (3rd Cir. 1986). The court held that since "outrageous conduct" is the "essence of punitive damages," this standard should govern an award of liquidated damages whose purpose is wholly punitive under the ADEA. The court relied upon the comments to Section 908(2) of the Restatement (Second) of Torts, quoting the following language:

> [S]ince the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate–which is to say, *conduct involving some element of outrage similar to that usually found in crime.*

Id. at 657-58 (emphasis added). Because the plaintiff in *Dryer* failed to establish outrageous conduct, the Court reversed the trial court's denial of the employer's judgment

judgment n.o.v. motion with respect to liquidated damages. *See also Smith v. Consolidated Mutual Water Co.*, 788 F.2d 1441, 1443 (10th Cir. 1986) (*Thurston* precludes award of liquidated damages where there was no evidence beyond the circumstantial evidence to support the finding of liability); *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 157-58 (7th Cir. 1981)[3] (liquidated damages not allowable absent direct or "compelling" evidence of a conscious intent to discriminate); *Spanier v. Morrisson's Management Services*, 611 F.Supp. 642, 647 (N.E. Ala. 1985) (under *Thurston*, "liquidated damages are not recoverable except when some aggravated circumstances, in addition to basic evidence of intentional discrimination, are present").[4] Accordingly, the Court finds that there is no basis for the jury's finding of willful discrimination in Bell's loss of employment.

Thurston and the other cases discussed above establish that liquidated damages are not intended to provide an automatic windfall to every plaintiff able to convince a jury that age may have been one of the determining factors in an employer's decision. Rather the criminal origins and punitive purpose of the ADEA's liquidated damage provision mandate that awards of such damages be limited to the most offensive and blatant instances of age discrimination. In this case the Court concludes that Defendant's conduct toward Bell cannot warrant the imposition of the harsh, quasi-criminal penalty of liquidated damages.

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3. *Syvock*, a pre-*Thurston* case, applies a "should have known" standard which is less stringent than that subsequently adopted by the Supreme Court in *Thurston*.

4. Under this heightened standard, a consideration of employer "good faith" is no longer necessary, since the more stringent showing of willfulness now required under *Thurston* necessarily obligates the plaintiff to establish the absence of good faith as a prerequisite of liquidated damages. *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 285 (5th Cir. 1986).

In conclusion, the Court finds that the Jury's findings that Bell was constructively discharged from her employment with Defendants and that age was a determinative factor in her discharge as well as the jury's award of $14,747.00 in back pay is consistent with the evidence presented at trial. However, the Court further finds that under the circumstances of this case the awarding of front pay to Bell is inappropriate. Instead, the Court orders Defendants to offer Bell reinstatement rather than front pay since her former supervisor with whom she had many problems at her job is no longer employed at Defendant Hospital. Additionally, the Court concludes that the evidence does not support the jury's finding that the Hospital's discharge of Bell was a willful violation of the age Discrimination Act (ADEA) and thus the Court finds that an award of double damages pursuant to 29 U.S.C. § 626(b) is not warranted.

Accordingly, the Court ORDERS Plaintiffs' counsel to file a brief on his requested attorney's fees consistent with the Court's ruling on or before September 18, 1987. Defendant may respond on or before September 25, 1987. A judgment will then be entered consistent with this opinion and include attorney's fees.

It is so ORDERED.

Signed this 8th day of September, 1987.

s/s Eldon B. Mahon
ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4-85-308-E

CHARLOTTE BLUMBERG AND
LONA BELL

VS.

HCA MANAGEMENT COMPANY, INC.
AND HOOD GENERAL HOSPITAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
DEC 9 1987
NANCY DOHERTY, CLERK
By s/s Deloris Duron
Deputy
(stamp)

MEMORANDUM OPINION

On September 9, 1987 the Court entered an Opinion finding that Plaintiff Charlotte Blumberg did not meet her burden of demonstrating a factual basis for equitably tolling the statutory period and overturning the jury's award of $54,284.00 in back pay to Charlotte Blumberg. With regard to Plaintiff Lona Bell, the Court found that she was constructively discharged from her employment with Defendants and that the jury's finding that age was a determinative factor

in her discharge as well as the jury's award of $14,747.00 in back pay was consistent with the evidence presented at trial. However, the Court further found that reinstatement rather than front pay was the appropriate remedy and that her discharge was not a willful violation of the Age Discrimination Act (ADEA). In compliance with the Court's Order, Plaintiffs filed a Brief Regarding Attorney's Fees to which Defendants Responded. After carefully considering the materials filed and the applicable law, the Court comes to the following decision.

The attorney's fees provision of the Fair Labor Standards Act, 29 U.S.C. § 216(b) controls the award of attorney's fees in actions under the ADEA. 29 U.S.C. § 626(b). Section 216(b) provides:

> The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant . . . .

In accordance with the above statute, the amount of a fee award in ADEA cases is within the Court's discretion.

The Fifth Circuit has adopted the "lodestar" method of calculating attorneys' fees, which is a refinement of the earlier test in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983). The first step is to determine the prevailing rate in the community for similar work and then multiply it by the reasonable number of hours expended. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Laurence Priddy has submitted an affidavit and itemized statement for the hours he had worked on this case. In total he states that 198 hours were spent on the combined cases

of Blumberg and Bell at the rate of $150.00 an hour and he requests attorney's fees in the amount of $29,812.50 for the trial of this cause.

Plaintiffs assert that although the Court "rejected Charlotte Blumberg's claim in its entirety," Plaintiffs attorney should be entitled to the full amount of attorney's fees incurred on behalf of both Lona Bell and Charlotte Blumberg. Plaintiff contends that both plaintiffs cases grew out of the same facts and thus were mutually supportive of each other. Defendants disagree with Plaintiffs' position that all work performed in the case benefitted Bell. They request that the Court restrict Plaintiffs' attorney's fee award to the amount of time attributable only to Lona Bell's case.

The Court finds that the hourly rate of $150.00 requested by Plaintiff's counsel is not excessive. However, the Court finds that the number of hours requested by Plaintiff is excessive in light of the fact that only Bell not Blumberg was a prevailing party. After carefully reviewing Plaintiff's time record the Court finds that there are only two entries relating specifically to Blumberg. Therefore, without requesting more detailed records of the services performed by Mr. Priddy, the Court will reduce the amount of hours requested by Plaintiffs to 119 hours (sixty-percent of the total requested for both plaintiffs; 119 pretrial hours, 59 trial hours, 20 post-trial hours, totalling 198 hours multiplied by 60 percent, or 119 hours). In summary, the Court finds that the lodestar figure for attorney's fees in this case is $17,850.00. This figure represents 119 hours of Mr. Priddy's time spent on Bell's case at $150.00 an hour.

The Court believes that this 40 percent reduction in requested attorney fees is eminently fair. Although Blumberg's action was barred by the statute of limitations, she brought a straight forward case of age discrimination. Bell,

however, bore a more onerous burden, namely, that of proving constructive discharge. Recovery sought under a theory of constructive discharge is a more demanding and complex case to establish—as opposed to an employee who alleges that she was simply terminated, unlawfully, due to age. Bell, through her attorney, was required to prove that working conditions were so intolerable that a reasonable person would have been compelled to resign. *See, e.g., Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65 (5th Cir. 1980). Thus, the complexity and additional proof required in Bell's action compels this Court to the conclusion that a more equitable division of attorney fees is required. A 50/50 split of the hours expended by the Plaintiffs' attorney in this case would not be fair.

Caselaw also supports this Court's 60/40 equitable division. The lodestar figure may be adjusted to reflect other factors in a case, such as the contingent nature of the suit and the quality of the representation. *See e.g., Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1093 (5th Cir. 1982). Under the rubric of the "contingent nature of the lawsuit" the Court must analyze the plaintiff's burden, including the complexity of the case, the probability of the defendant's liability, and the risks assumed in developing the case, including the number of hours of labor risked without guarantee of remuneration, the amount of out-of-pocket expenses advanced, and the development of prior expertise in this area of litigation. The Court may also take into consideration the delay, if any, in receipt of payment for services rendered.

The Court finds that Bell's action seeking recovery under a theory of constructive discharge increased the factual and legal complexities of her case. This increased burden merits the payment of 60 percent of the fees requested by the attorney who jointly represented both Bell and Blumberg.

The Court further finds that once liability was established, damages were not difficult to ascertain. Also, the Court finds that while the cases were accepted on a contingency basis that fact alone does not support an additional enhancement of the lodestar fee. *Wheeler v. Mental Health & Retardation Authority*, 752 F.2d 1063, 1073 (5th Cir.), *cert. denied*, 106 S.Ct. 78 (1985). In considering the final two factors, the Court finds that Plaintiff's counsel appeared thoroughly familiar with the litigation and that the official record does not indicate whether Plaintiff's counsel received any remuneration from the Plaintiff to cover the costs of such items as depositions and filing fees; however, from the Expense Affidavits submitted by Plaintiff totalling $2,108.80, the Court assumes that no such remuneration was provided by Bell to her attorney. The Court finds that the Plaintiff is only entitled to a portion of those items listed as costs in the Expense Affidavits. The Court finds that the Plaintiff is entitled to reimbursement for filing and service fees totalling $130.00, court reporter fees totalling $587.87 ($134.75 for Bell's deposition and 60% of the fees for all other deponents excluding Blumberg), witness subpoena and service fees totalling $174.00. These reimburseable costs/expenses amount to $891.87. In summation, the Court finds that the lodestar figure is therefore increased by $891.87 cost/expenses). Thus, the total fee award in this case totals $18,741.87 ($17,850.00 + $891.87).

The lodestar figure also may be adjusted through the use of a multiplier to reflect the quality of the representation. *Graves v. Barnes*, 700 F.2d 220, 223 (5th Cir. 1983). The Court may consider the result obtained and the professional methods used in processing the case. *Lindy Bors. Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 117-18 (3rd Cir. 1976) (en banc). The quality of an attorney's work, in general, is a component of the reasonable hourly rate, an increase or decrease should be given

under this category only when the attorney displays a skill above or below that expected for lawyers of the caliber reflected in the hourly rates. An increase or decrease reflects exceptional services only, and is considered in the nature of a bonus or penalty. *Id.* In fact, the Supreme Court has indicated that " 'result obtained' generally will be subsumed within other factors used to calculate a reasonable fee, [and] it normally should not provide an independent basis for increasing the fee award." *Blum v. Stenson*, 104 S.Ct. 1541, 1549 (1984).

The Court recognizes that Plaintiff's counsel obtained a favorable judgment for Plaintiff Bell, and the Court was pleased with the presentation of the Plaintiff's case by counsel. But the Court does not find that either of these two factors requires the Court to augment the attorneys' fees. The lodestar figure adequately reflects the skill level demonstrated by Plaintiff's counsel.

Thus, the remaining question before this Court is whether Plaintiffs are entitled to an award of attorney's fees for appeal of this cause in the event the cause is appealed and Bell prevails upon appeal. Plaintiffs specifically request $6,000.00 for this purpose. Defendants respond that the request is premature and should be denied until Plaintiffs become entitled to such fees.

Attorney's fees for appellate work should be requested from the appellate court in the event an appeal is taken. *See O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 748 F.2d 1543, 1553 (11th Cir. 1984); *Hendrick v. Hercules, Inc.*, 658 F.2d 1088, 1097-98 (5th Cir. 1981). Therefore, the Court will not award $6,000.00 for appeal purposes to Plaintiffs.

In summary, the Court finds that Plaintiff Bell is entitled to an award of attorney's fees in the amount of $18,741.87 for trial. A judgment will be entered consistent with this opinion.

Signed this 8th day of December, 1987.

s/s Eldon B. Mahon
ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

APPENDIX D

(PLEASE PRINT OR TYPE)

CHARGE OF DISCRIMINATION
IMPORTANT: This Form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing it.

APPROVED BY OMB
3046-0012
Expires 12/31/83

CHARGE NUMBER(S) (AGENCY USE ONLY)
[ ] STATE/LOCAL AGENCY
[X] EEOC 061 84 2276

Equal Employment Opportunity Commission and Texas Human Rights Commission (State or Local Agency)

NAME (Indicate Mr., Ms. or Mrs.)
Charlotte M. Blumberg

HOME TELEPHONE NUMBER (Include area code)
(817) 573-2550

STREET ADDRESS
987-13 Brazos Dr. I.H.

CITY, STATE, AND ZIP CODE
Granbury, Texas 76048

COUNTY
Hood

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below).

NAME
Hood General Hospital

TELEPHONE NUMBER (Include area code)
(817) 573-2683

STREET ADDRESS
1310 Puluxy Road

CITY, STATE, AND ZIP CODE
Granbury, Texas 76048

CAUSE OF DISCRIMINATION BASED ON MY (Check appropriate box(es))

[ ] RACE
[ ] COLOR
[ ] SEX
[ ] RELIGION
[ ] NATIONAL ORIGIN
[X] OTHER (Specify) ADEA DOB 01-08-20

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year)
August 3, 1983

THE PARTICULARS ARE:

I. *Personal Harm:*

I was discharged.

Background: I was hired September 2, 1977 as a Staff Nurse and held the position of 3-11 House Director when I was discharged on August 3, 1983.

II. *Respondent Reason For Adverse Action:*

I was told that I was being discharged because I continued to call in the OB call nurse.

III. *Discrimination Statement:*

I believe that I have been discriminated against because of my age *64* in violation of the Age Discrimination in Employment Act of 1967, as amended, in that:

A. On August 3, 1983, Connie Ettefaugh, Director of Nurses discharged me stating that I continued to call in the OB call nurse. I did explain to Ms. Ettefaugh that the reason I called the nurse in was because it was absolutely necessary.

B. I was told previously by some employees that Ms. Ettefaugh had made the statement that she was going to "get rid of that old grey headed nurse".

C. I was replaced by a much younger person, approximately 30 years old.

I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

DATE 5-23-84 CHARGING PARTY (Signature)
s/s Charlotte M. Blumberg

NOTARY – (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
s/s Charlotte M. Blumberg

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)
s/s Myia Bowman Burns
Commission Rep.

May 23, 1984

PREVIOUS EDITIONS OF ALL EEOC FORM 5'S
ARE OBSOLETE AND MUST NOT BE USED

EEOC FORM 5B MAR 79

CHARGE FILE COPY

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4-85-308-E

CHARLOTTE BLUMBERG, ET AL.

VS.

HOOD GENERAL HOSPITAL, ET AL.

VERDICT OF THE JURY

We, the Jury, return our answers the following questions as our Verdict in this case.

QUESTION NO. 1:

Do you find from a preponderance of the evidence that Charlotte Blumberg's age was a determinative factor in her discharge from her employment with defendants?

ANSWER: (X) Yes ( ) No

If you answered Question No. 1 "Yes," then answer Question No. 2; if you answered Question No. 1 "No," then proceed and answer Question No. 5.

QUESTION NO. 2:

Find from a preponderance of the evidence, on what date did Charlotte Blumberg know or she should have known that age was a determinative factor in her discharge.

ANSWER: ap 1984

Regardless of your answer to this question, proceed and answer Question No. 3.

QUESTION NO. 3:

Do you find from a preponderance of the evidence that at the time and on the occasion in question, defendants' termination of Charlotte Blumberg was "willful" as that term has been defined in the Court's Charge?

ANSWER: (X) Yes ( ) No

Regardless of your answer to this question, proceed, and answer Question No. 4.

QUESTION NO. 4:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Plaintiff Charlotte Blumberg for earnings, wages, and fringe benefits, if any, that she has lost from the time of her termination until the date of this trial?

You are reminded that in determining damages you must deduct any earnings, unemployment compensation, wages, and fringe benefits which plaintiff actually received or would have received in exercising reasonable efforts to seek employment.

Answer in dollars and cents, if any, or "none."

ANSWER: 54,284.00

Regardless of how you answered this question, proceed and answer Question No. 5.

QUESTION NO. 5:

Do you find from a preponderance of the evidence that Lona Bell was terminated or constructively discharged from her employment with defendants?

ANSWER: (X) Yes ( ) No

If you answered Question No. 5 "Yes," then answer Question No. 6; if you answered Question No. 6 "No," then answer no further questions.

QUESTION NO. 6:

Do you find from a preponderance of the evidence that Lona Bell's age was a determinative factor in her discharge from her employment with defendants?

ANSWER: (X) Yes ( ) No

If you answered Question No. 6 "Yes," then answer Question No. 7; if you answered Question No. 6 "No," then answer no further questions.

QUESTION NO. 7:

Do you find from a preponderance of the evidence that at the time and on the occasion in question defendants' termination of Mrs. Bell was "willful" as that term has been defined in the Court's Charge?

ANSWER: (X) Yes ( ) No

Regardless of how you answered this question, proceed and answer Question No. 8.

QUESTION NO. 8:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Plaintiff Lona Bell for earnings, wages, and fringe benefits if any, that she has lost from the time of her termination until the date of this trial?

You are reminded that in determining damages you must deduct any earnings, unemployment compensation, wages, and fringe benefits which plaintiff actually received or would have received in exercising reasonable efforts to seek employment.

Answer in dollars and cents, if any, or "none."

ANSWER: 14,747.00

Regardless of how you answered this question, proceed and answer Question No. 9.

QUESTION NO. 9:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Plaintiff Lona Bell for earnings, wages, and fringe benefits, if any, that she would lose from the date of trial through her retirement date at the age of 65?

You are reminded that in determining damages you must deduct any earnings, wages, and fringe benefits which plaintiff actually received or would have received had she exercised reasonable diligence in seeking employment.

Answer in dollars and cents, if any, or "none."

ANSWER: 43,264.00

26 Sept 86	s/s Rev Robert Morman
DATE	FOREMAN
DATE	UNITED STATES DISTRICT JUDGE

APPENDIX F

EXCERPT FROM APPELLANT'S REPLY BRIEF IN FIFTH CIRCUIT

CONCLUSION

WHEREFORE, Plaintiff respectfully prays that the Court hold that her claim was timely filed as a matter of law, and reinstate her damage award. Alternatively, Plaintiff prays that the Court remand the cause to the District Court for a determination of the facts as to when her claim was filed and whether it was filed with the Human Relations Commission of the State of Texas. Alternatively, if the Court believes that it is not established as a matter of law that her claim was timely, Plaintiff prays that the Court reinstate the jury finding that she did not know that she had a claim until April of 1984, hold that a period of equitable tolling existed, and reinstate Plaintiff's damage award on that basis. Plaintiff further prays that the Court either award her attorney's fees and discretionary damages, or remand the cause to the District Court for that purpose.

Supreme Court, U.S.
FILED
NOV 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLOTTE BLUMBERG,

Petitioner,

vs.

HCA MANAGEMENT COMPANY, INC. and HOOD GENERAL HOSPITAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

JEFFERSON D. KIRBY, III
Counsel of Record
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

Attorneys for HCA Management Company, Inc. and Hood General Hospital

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the failure of the Petitioner to assert at any time before filing her reply brief with the Court of Appeals that she was entitled to the extended 300-day period specified in the Age Discrimination in Employment Act, 29 U.S.C. § 626(d)(2), for filing a charge of employment discrimination with the Equal Employment Opportunity Commission precludes consideration of that issue.

2. Whether a charging party is barred from relying on the extended 300-day period for filing a charge of discrimination with the Equal Employment Opportunity Commission where she has not pursued her claims of age discrimination before the state deferral agency.

3. Whether the time period for filing a charge of employment discrimination with the Equal Employment Opportunity Commission is to be equitably tolled in the absence of any sort of misconduct by the employer where the charging party was aware of the facts upon which she relied in support of her *prima facie* case at the time of her discharge, where she had suspected that she was being discriminated against on account of her age even prior to her termination and where she ignored the advice of attorneys within the limitations period that she had to file a charge of discrimination in order to pursue her claims.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit appear in the caption of the case in this Court.[1]

---

[1] Pursuant to Supreme Court Rule 28, the following is a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of HCA Management Company, Inc.: Hospital Corporation of America. Hood General Hospital has no parent company, subsidiaries or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-727

CHARLOTTE BLUMBERG,

Petitioner,

vs.

HCA MANAGEMENT COMPANY, INC. and HOOD GENERAL HOSPITAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, HCA Management Company, Inc. ("HMC") and Hood General Hospital (the "Hospital"), respectfully urge denial of the Petition for a Writ of Certiorari to review the judgment and order entered by the United States Court of Appeals for the Fifth Circuit on July 5, 1988.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

Certain provisions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, are involved in this case. In particular, this case concerns 29 U.S.C. § 626(d) and 29 U.S.C. § 633(b). Those provisions are set forth at pp. 2-3 of the Petition.

STATEMENT OF THE CASE

I. The Relevant Facts

In September, 1977, when she was 57 years old, Charlotte Blumberg was hired by the Hospital. She worked as a nurse at the Hospital until her employment was terminated on August 3, 1983.

In June, 1983, after she had been counseled by her superiors concerning her job performance, Blumberg composed a letter to the Hospital concerning what she believed to have been unfair treatment. Although that letter was never actually sent to the Hospital, Blumberg admits that she considered herself to be a victim of age discrimination at least as early as the date of that letter, June 20, 1983.

Blumberg also concedes that, when she was discharged six weeks later, she immediately suspected her age to have been the reason. By that time, she claimed to have been told that Connie Ettefagh, the Director of Nursing Services at the Hospital, had said that she intended to get rid of that "old nurse." Moreover, Blumberg believed her replacement to have been Tricia Hartzoge, a woman in her 30's. Nevertheless, Blumberg delayed filing her charge of employment discrimination with the Equal Employment Opportunity Commission until May 23, 1984, 294 days after her dismissal.

According to Blumberg, her failure to act sooner was caused by her inability to locate an attorney willing to undertake representation of her claims. In September or October of 1983, she initially contacted an attorney who was not interested in pursuing the case. Later that year, she spoke with another attorney who advised her that she would have to go through the EEOC process and requested that she call him again once she had satisfied that requirement. Blumberg also made an appointment with a third attorney, but later cancelled that appointment because the lawyer's secretary had been "rather discouraging," advising her that discrimination cases were difficult to prove.

Despite the express recommendation that she comply with the EEOC procedures, Blumberg simply did nothing in regard to her claims until April, 1984, when she consulted her trial counsel. Even then, it was not until the end of the following month that she finally filed a charge of discrimination with the EEOC.

II. The Proceedings Below

On June 4, 1985, Blumberg and Lona Bell, a co-plaintiff, filed a complaint in the United States District Court for the Northern District of Texas, alleging that they had been discriminated against on account of their ages in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. In their answer, HMC and the Hospital asserted that Blumberg had failed to file a timely charge of employment discrimination with the EEOC and that her claims were therefore subject to dismissal.

Throughout the proceedings before the District Court, Blumberg acknowledged that the 180-day limitations period set forth in 29 U.S.C. § 626(d)(1) ap-

plied since no state deferral agency was in existence at the time that the allegedly discriminatory act had occurred. As her counsel expressly declared during the trial, "[T]he law is fairly clear that Texas was not a deferral state. That's all pretty well settled. It's just a question of whether she is entitled to this tolling that would make her claim timely or not."

The jury returned a verdict in favor of Blumberg and awarded her $54,284. The District Court overturned that award, finding that her EEOC charge had been untimely and that no basis existed for tolling that limitations period.

In her initial brief on appeal to the Court of Appeals for the Fifth Circuit, Blumberg noted that, "At the time of plaintiff's termination on August 3, 1983, Texas had no state agency for civil rights complaints and was therefore not a deferral state . . . Since Texas was not a deferral state at the time of plaintiff's termination, she only had 180 days to file her claim."

After HMC and the Hospital filed their brief citing *Mennor v. Fort Hood National Bank*, 829 F.2d 553 (5th Cir. 1987), Blumberg, in her reply brief, contended for the first time that she was entitled to the extended 300-day period within which to file a charge of discrimination with the EEOC. According to Blumberg, the establishment of a deferral agency, the Texas Commission on Human Rights, on September 23, 1983, several weeks after her discharge, prolonged the applicable limitations period.

On July 5, 1988, the Court of Appeals affirmed, ruling that the extended 300-day period was not applicable to Blumberg's claim. The Court found that her failure to raise the 300-day period until she filed

her reply brief barred consideration of the issue, and, in any event, since Blumberg had not shown that she had ever pursued her discrimination claims before the Texas Commission on Human Rights, she was not entitled to invoke the 300-day period. No basis existed for tolling the 180-day limitations period, and, accordingly, the EEOC charge filed by Blumberg was untimely.

A petition for rehearing was denied on August 1, 1988.

REASONS FOR DENYING THE WRIT

Resolution of the questions raised by the Petition would affect virtually no one other than the litigants in this action. Each of the issues involves a unique factual situation found to be determinative by the Fifth Circuit, and no significant legal matters were considered below. No conflict exists among the courts as to any of the questions raised, and nothing warranting review by this Court is presented by the Petition.

I. Blumberg Forfeited Any Claim To The Extended 300-Day Period

Contrary to the assertion in her Petition, Blumberg was not "deprived of the benefit" of *Mennor v. Fort Hood National Bank*, 829 F.2d 553 (5th Cir. 1987), simply because she failed to cite that decision in her original brief to the Fifth Circuit. In *Mennor*, the Court ruled that the extended 300-day period specified in Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(e), applied to discriminatory acts which occurred prior to the creation of the Texas Commission on Human Rights. Blumberg did not merely overlook the *Mennor* decision in her initial

brief. At no time prior to filing her reply brief had Blumberg suggested to the District Court or the Court of Appeals that the 300-day period was applicable. Instead, she conceded that the 180-day period set forth in 29 U.S.C. § 626(d)(1) governed her claim.

In ruling that Blumberg had waived any claim that the 300-day period was appropriate, the Fifth Circuit relied on the universally-recognized rule prohibiting consideration of issues raised for the first time in a reply brief. *See, e.g., Daggett v. Kimmelman*, 811 F.2d 793, 795 n.1 (3d Cir. 1987); *Wright v. Holbrook*, 794 F.2d 1152, 1156 (6th Cir. 1986); *United States v. Oakley*, 744 F.2d 1553, 1556 (11th Cir. 1984); *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983); *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); *United States v. Bucchino*, 606 F.2d 590, 591 (5th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); *United States Steel Corp. v. Train*, 556 F.2d 822, 839 n.23 (7th Cir. 1977); *United States v. Haldeman*, 559 F.2d 31, 78 n.113 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *Mississippi River Corp. v. Federal Trade Commission*, 454 F.2d 1083, 1093 (8th Cir. 1972). Where the applicability of a particular limitations period has not been properly raised by the parties, this Court has refused to consider whether that particular period should govern in deciding whether the claim was time-barred. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). Only if the issue has been addressed in the trial court and asserted in the opening brief of the appellant is appellate review proper.

Here, Blumberg never contested the applicability of the 180-day limitations period before the District Court or in her initial brief on appeal. The Fifth Cir-

cuit was therefore correct in refusing to apply the 300-day period to her claims, and the Petition should be denied.

II. Blumberg Failed To Satisfy The Conditions Precedent To Filing Suit In A Deferral State

In their answers to Blumberg's complaint, HMC and the Hospital specifically denied that she had met the conditions precedent to filing suit under the ADEA. Thus, Blumberg had the burden of proving that she had satisfied the prerequisites to commencing an ADEA action. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). As she failed to offer any evidence at trial to demonstrate that she had pursued her remedies before the appropriate state agency, her claims are subject to dismissal even if Texas is considered a deferral state entitling her to the 300-day limitation period.

The EEOC charge upon which she relies was merely an exhibit to a summary judgment motion filed by HMC and the Hospital and was never introduced at trial. No evidence was presented at trial to show whether Blumberg had initiated proceedings before the Texas agency, and she cannot satisfy her burden of proving federal jurisdiction by relying on an exhibit to a pretrial motion.

Moreover, while that EEOC charge does mention the Texas Commission on Human Rights, nothing in the charge indicates that the EEOC was requested to transmit or in fact transmitted the charge to that agency. On the contrary, as the Fifth Circuit noted, in the section labelled "Charge Number(s) (Agency Use Only)," the block has been checked indicating that the filing was made with the EEOC and that

charge number 061-84-2276 was assigned. The block marked "State/Local Agency" was left blank and no state number listed, presumably showing that no filing with such an agency was desired.

As Blumberg failed to pursue her claims before the state agency, her action is subject to dismissal if the establishment of the Texas Commission on Human Rights renders the 300-day limitation period applicable. In those jurisdictions which have created deferral agencies, pursuit of state remedies is a prerequisite to suit under the ADEA. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

Although this Court in *Oscar Mayer* did permit an employee to satisfy the requirement that available state administrative remedies be exhausted while his federal litigation was held in abeyance, the parties in that case had not even commenced discovery at the time. Here, a full trial has been completed, and Blumberg was unable to meet her burden of proving that federal jurisdiction existed. Not only would this case have to be held in abeyance for her to pursue her state remedies at this time, but the trial record would have to be reopened in order for Blumberg to show that she is now willing to proceed with a charge before the Texas agency. *Oscar Mayer* does not compel such a result.

Even before a full trial has been completed, an employee who has filed an ADEA action in a deferral jurisdiction without having first invoked the available state remedial procedures need not be afforded an opportunity to satisfy that precondition to suit while the case remains pending. Depending upon the circumstances, the trial judge has discretion to hold the case in abeyance or dismiss it altogether. *See, e.g.*,

Smith v. General Scanning, Inc., 832 F.2d 96, 100 (7th Cir. 1987); *Cornett v. AVCO Financial Services*, 792 F.2d 447, 450 (4th Cir. 1986).

No abuse of discretion can be predicated on a dismissal after the trial has concluded without the deferral process having been commenced. More than five years after the allegedly discriminatory act occurred, Blumberg still has not complied with the conditions precedent to initiating an ADEA action in a deferral state, and she is not entitled to rely on the extended 300-day period applicable in such jurisdictions. The Fifth Circuit properly affirmed the dismissal of Blumberg's claims, and, accordingly, the Petition should be denied.

III. No Equitable Tolling Of The Limitations Period Is Proper

Despite being fully aware soon after her discharge of the evidence upon which she relied in presenting a *prima facie* case of discrimination, Blumberg contends that the limitations period should be extended until she possessed virtually all of the information she eventually presented to the jury. At the time of her discharge she immediately suspected age discrimination and consulted with at least one attorney whose advice that she file an EEOC charge she simply ignored.

HMC and the Hospital did nothing to mislead Blumberg concerning her rights, nor did they conceal any pertinent facts from her. Blumberg herself neglected her claim until it had become stale. No basis exists for tolling the 180-day limitations period, and Blumberg's charge was untimely. The Petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JEFFERSON D. KIRBY, III
Counsel of Record
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

Attorneys for HCA Management Company, Inc. and Hood General Hospital